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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5364

DARNELL BROWN,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

On Writ of Certiorari to the
Supreme Court of Louisiana

BRIEF OF STATE OF LOUISIANA, RESPONDENT

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IN THE
SUPREME COURT OF THE UNITED STATES
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No. 79-5364

DARNELL BROWN,
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STATE OF LOUISIANA,
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On Writ of Certiorari to the
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BRIEF OF THE STATE OF LOUISIANA, RESPONDENT

STATEMENT OF THE CASE

On July 20, 1978 Levertes Dorsch and her daughter, Kenella Dixon were living, respectively, at 2930 and 2932 Florida Avenue, in a double "shotgun"-type house, located in New Orleans, Louisiana. On the

morning of July 20, Ms. Dixon drove her mother to her job as a domestic maid, ran some errands, and returned home at about 10:00 A.M. Upon her arrival she heard footsteps coming from her mother's side of the duplex structure. Noticing that a rear window had been broken, she called the police. Petitioner was arrested inside Ms. Dorsch's apartment, as he attempted to flee. At the time of arrest, Petitioner was wearing rubber gloves. Investigation revealed that the residence had been ransacked, and that various items such as cameras, a television, and a radio had been packed into boxes and positioned at the rear door.

Consequently, on July 31, 1978 Petitioner was charged by Bill of Information with simple burglary, La. R.S. 14:62. Before trial, a Motion to Quash the jury was filed, and was denied by the court. On August 23, 1978 a six-member jury was empanelled, and after due proceedings, a verdict of guilty as charged was returned. A poll of the jury revealed that their vote was five guilty, one not guilty.[1] Thereafter, Petitioner filed

1 At the time of Petitioner's trial, Article I, Section 17 of the Louisiana Constitution of 1974 provided in pertinent part:

> A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict.

a Motion for New Trial, based on the illegality of the jury verdict, which was denied. Subsequently, the State filed a Bill of Information alleging that Petitioner was a third felony offender.[2] At the Multiple-Offender Hearing, the Petitioner plead guilty as charged, and was accordingly sentenced to serve twenty-two years at hard labor.

On appeal, the Louisiana Supreme Court affirmed the conviction and sentence. *State v. Brown*, 371 So.2d 746, (La. 1979). Brown then petitioned this Honorable Court for Certiorari, complaining that *Burch v. Louisiana*, ____ U.S. ____, 99 S.Ct. 1623 (1979) should be applied retroactively to reverse his conviction. Certiorari was granted on December 10, 1979.

Louisiana Code of Criminal Procedure Article 779 (a) provided:

> A. A defendant charged with a misdemeanor in which the punishment may be a fine in excess of five hundred dollars or imprisonment for more than six months shall be tried by a jury of six jurors, five of whom must concur to render a verdict.

Louisiana Code of Criminal Procedure Article 782 (a) provided:

> A. Cases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which the punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Cases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, five of whom must concur to render a verdict.

2 La. R.S. 15:529.1. Petitioner had been previously convicted of felony theft on two occasions, La. R.S. 14:67; receiving stolen things, La. R.S. 14:69; simple escape, La. R.S. 14:110; criminal trespass, La. R.S. 14:63; and attempted simple burglary, La. R.S. 14(27)62.

ARGUMENT

The Decision of the United States Supreme Court in *Burch v. Louisiana*, ____ U.S. ____, 99 S.Ct. 1623 (1979) Should be Given Prospective Application Only

Darnell Brown was charged in the instant proceeding with simple burglary, as defined in Article 62 of the Louisiana Criminal Code, for which the penalty was imprisonment in the parish prison or the state penitentiary for no more than twelve years.

Article I, Section 17, of the Louisiana Constitution of 1974 provided that a case in which the punishment may be in excess of six months shall be tried by a six-member jury, five of whom must concur to render a verdict. Article 782 of the Louisiana Code of Criminal Procedure implemented that constitutional provision.

Petitioner was convicted by the five-to-one vote of a six-member jury on July 20, 1978. This Honorable Court decided *Burch v. Louisiana*, ____U.S. ____, 99 S.Ct. 1623, on April 17, 1979. The State respectfully urges this Honorable Court to deny retroactive application to *Burch*, and affirm Petitioner's conviction.

I.

The Law of Retroactivity In General

The notion that judicial decisions involving constitutional criminal procedure might be given

prospective, rather than retrospective effect, was first specifically articulated in *Linkletter v. Walker*, 381 U.S. 618 (1965).[3] In *Linkletter*, the Court held that the exclusionary rule announced in *Mapp v. Ohio*[4] was inapplicable to cases in which the convictions had become final before *Mapp* was decided.[5] In reaching its decision, the Court stated:

> Once the premise is accepted that we are neither required to apply, nor prohibited from applying a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.
> 381 U.S., at 629.

The Court determined that since the purpose of *Mapp* was to deter improper police activity, this deterrent function would not be served by retroactive

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3 Prior to *Linkletter*, this Honorable Court had held that State Courts might apply new rules prospectively or retroactively. *See, e.g., Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940); *Great Northern Railway v. Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932). *Linkletter*, differed in that it was a criminal procedure case in which the defendant sought the benefit of a newly announced procedural rule. Further, it involved a federal constitutional question; whereas earlier cases had come from State Courts, or had involved statutory or common-law matters.

4 367 U.S. 643 (1961).

5 *Linkletter* involved only convictions on collateral review. *Mapp* had previously been applied to cases on direct review, by its own terms. 381 U.S., at 622.

application. The Court went on to discuss three recent retroactive decisions,[6] and isolated the factor that occupies a central role in the law of retroactivity: Does the legal principle involved go to the "fairness of the trial, the very integrity of the fact-finding process"? 381 U.S., at 639.[7]

In *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966) the Court held that the Fifth Amendment rule articulated in *Griffin v. California*,[8] was to be given prospective effect. The Court characterized the privilege against self-incrimination as safeguarding values other than the fairness of the fact-finding process.[9] It

6 *Jackson v. Denno*, 378 U.S. 368 (1964) (right to a preliminary determination by a judge of the voluntariness of a confession); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to appointed counsel in a felony case); *Griffin v. Illinois*, 351 U.S. 12 (1956) (right to a free trial transcript on appeal).

7 *But see: Robinson v. Neil*, 409 U.S. 505 (1973) where the court gave retroactive effect to *Benton v. Maryland*, 395 U.S. 784 (1969) and *Waller v. Florida*, 397 U.S. 387 (1970), which established double jeopardy rules of the federal constitution are applicable to the States. The Court found the *Linkletter* analysis inappropriate, since *Benton* and *Waller* did not raise issues of evidence or mode of trial. *See also: Furman v. Georgia*, 408 U.S. 238 (1972); *United States v. United States Coin and Currency*, 401 U.S. 715 (1970).

8 *Griffin v. California*, 380 U.S. 609 (1965) (prohibiting adverse comment on a defendant's failure to testify). *Tehan* denied retroactivity to only those cases on collateral review, because *Griffin*, by its terms, applied to cases pending on direct review at the time of its decision. *See* note 5 *supra*.

9 "'First, the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution shoulder the entire load!" 382 U.S. at 414, 415.

emphasized countervailing factors: reliance of prosecutors on the prior jurisprudence and the profound impact on the administration of justice that retroactivity would involve. 382 U.S., at 417.

The Court's decision in *Johnson v. New Jersey*, 384 U.S. 719 (1966) denied retroactive application[10] to *Escobedo v. Illinois*[11] and *Miranda v. Arizona*[12] and further refined the relevant inquiry. Arguably, the purpose of *Miranda* and *Escobedo* did in fact go to the "essence of the fact-finding process." That is, to exclude coerced, and therefore suspect confessions. Significantly, the Court stated:

> . . . . the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree.
>
> . . . . We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth determining process at trial. 384 U.S., at 728-29.

10 The Court ruled, specifically, that *Miranda* and *Escobedo* applied only to trials begun after the dates of those decisions. 384 U.S., at 732. Additionally, the court rejected any distinction between cases on direct or collateral review for the purposes of retroactivity. *Id.*

11 378 U.S. 478 (1964).

12 384 U.S. 436 (1966).

Additionally, the Court emphasized the disruptive impact of retroactivity on the administration of the criminal laws. 384 U.S., at 731. For the first time it recognized that reliance on prior law was justified because *Escobedo* and *Miranda* had not been "foreshadowed" by earlier holdings. *Id.*

In *Stovall v. Denno,* 388 U.S. 293 (1967) the Court denied retroactive application[13] to *United States v. Wade* and *Gilbert v. California,* [14] and established the so-called "three-pronged" test for retroactive application:

> The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. 388 U.S., at 297.

As to the first factor, the Court noted that the purpose of *Wade* and *Gilbert* was to avoid unfairness by enhancing the reliability of the fact-finding process. However, balancing "purpose" against the "reliance"

13 The Court focused its attention on the time of the constitutional violation, not on the start of the trial, as it had in *Johnson,* 388 U.S. at 296.

Significantly, as in *Johnson, supra,* the Court refused to distinguish cases pending on direct review from cases on collateral review. 388 U.S. at 300, 301.

14 *United States v. Wade,* 388 U.S. 218 (1967) and *Gilbert v. California,* 388 U.S. 263 (1967) involved the right to counsel at pretrial line-ups.

and "effect" factors, the Court found retroactive application inappropriate, and noted:

> The extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities' . . . . Such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity on the administration of justice. 388 U.S., at 298.[15]

Desist v. United States, 394 U.S. 244 (1969) denied retroactive effect to *Katz v. United States,*[16] since its

15 In the 1968 Term, the Court applied the *Stovall* balancing test to numerous questions of constitutional criminal procedure. In *Witherspoon v. Illinois,* 391 U.S. 510 (1968) the Court determined that improper jury selection could undermine the integrity of the fact-finding process, and that this factor outweighed reliance and effect. In *Roberts v. Russell,* 392 U.S. 293 (1968) the Court ruled that *Bruton v. United States,* 391 U.S. 123 (1968) applied retroactively because the prohibited procedure threatened the reliability of the verdict. Significantly, the Court determined that *Bruton* should have been anticipated after the decision in *Jackson v. Denno,* 378 U.S. 368 (1964).

See also: Arsenault v. Massachusetts, 393 U.S. 6 (1968) (right to counsel at certain preliminary hearings); *Berger v. California,* 393 U.S. 314 (1968) (constitutional right of confrontation); *McConnell v. Rhay,* 393 U.S. 3 (1968) (right to counsel at sentencing).

But C.F.: Fuller v. Alaska, 393 U.S. 80 (1968) (holding *Lee v. Florida,* 392 U.S. 378 (1968) to have prospective effect since its purpose was to encourage enforcement of federal law); *DeStefano v. Woods,* 392 U.S. 631 (1968) (holding *Duncan v. Louisiana,* 391 U.S. 145 (1968) and *Bloom v. Illinois,* 391 U.S. 194 (1968), involving the right to jury trial, to be prospective only). For a detailed discussion of *DeStefano, see* text at note 29, *infra.*

16 *Katz v. United States,* 389 U.S. 347 (1967) involved electronic surveillance activities, and overruled the pre-existing rules which turned on theories of physical intrusion.

deterrent purpose would not be served by retroactivity. Importantly, the Court ranked the first part of the Stovall test — purpose — as foremost among the factors to be considered:

> It is to be noted also that we have relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity. 394 U.S., at 252.

Williams v. United States, 401 U.S. 646 (1971) dealt, as did *Desist*, with a Fourth Amendment question. In denying retroactive application to *Chimel v. California*[17] the Court succinctly stated the relevant inquiry:

> In both *Johnson* and *Stovall*, we frankly acknowledged that 'the extent to which a condemned practice infects the integrity of the truth-determining process at trial is a "question of probabilities" ' . . . . Where we have been unable to conclude that the use of such a 'condemned practice' in past criminal trials presents a substantial likelihood that the results of a number of those trials were factually incorrect, we have not accorded retroactive effect . . . 401 U.S., at 656, n7.[18]

17 *Chimel v. California*, 395 U.S. 752 (1969) involved warrantless searches incident to arrests.

The Court's decision in *Gosa v. Mayden*, 413 U.S. 655 (1973) denied retroactive effect to *O'Callahan v. Parker*.[19] That case established that military personnel are entitled to a civilian trial for non-service related offenses. In a plurality opinion the court characterized the *O'Callahan* principle as a "prophylactic rule" which only "incidently" enhanced the reliability of the fact-finding process. 413 U.S., at 680.

The Court stated:

> Thus, retroactivity is not required by a determination that the old standard was not the most effective vehicle for ascertaining the truth, or that the truth-determining process has been aided somewhat by the new standard, or that one of several purposes in formulating the new standard was to prevent distortion in the process. *Id.*

18 In *Mackey v. United States*, 401 U.S. 667 (1971), decided the same day as *Williams*, the Court denied retroactive effect to *Marchetti v. United States*, 290 U.S. 39 (1968) and *Grosso v. United States*, 390 U.S. 62 (1968). The Court reasoned these decisions involved protection of the Fifth Amendment privilege, not the truth-seeking function of the trial. *But see: United States v. United States Coin and Currency*, 401 U.S. 715 (1970) (holding *Marchetti* and *Grosso* retroactive to the extent that they control conduct that cannot itself be constitutionally punished).

19 395 U.S. 258 (1969).

In reaching its decision, the *Gosa* Court placed heavy reliance on *DeStefano v. Woods,*[20] 392 U.S. 631 (1968), reasoning that the validity of convictions by military tribunals was not sufficiently in doubt to require retroactivity. 413 U.S., at 676.

The decisions in *Ivan v. City of New York,* 407 U.S. 203 (1972)[21] and *Hankerson v. North Carolina,* 432 U.S. 233 (1977),[22] when read together, further sharpen the issue before this Court. The essential question in both cases turned on "reasonable doubt," which the Court characterized as a "bedrock principle" whose enforcement lies "at the foundation of the administration of our criminal law." 432 U.S., at 241.

Ivan and *Hankerson* establish that:

> Where the *major* purpose of a new constitutional doctrine is to overcome an aspect of the criminal trial that *substantially* impairs its truth-finding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials, the new rule is given complete retroactive effect. 432 U.S., at 243.

Since reasonable doubt is "substantial", retroactivity was determined in both cases.

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20 *See* text at note *30, infra.*

21 Holding *In re Winship,* 397 U.S. 358 (1970) to be retroactive.

22 Holding *Mullaney v. Wilbur,* 421 U.S. 684 (1975) to be retroactive.

In summary, when a constitutional rule of criminal procedure is at issue, the first inquiry should be directed to its "major" purpose. Retroactivity is appropriate if that purpose is to overcome as aspect of the trial that "substantially" impairs the truth-finding function and raises "serious" doubts about past verdicts. However, if the rule is "prophylactic" in nature, and only "incidently" enhances the reliability of the trial, the three-pronged *Stovall* test should determine its reach.

II. Purpose of *Burch v. Louisiana*

The State submits that the purpose of the Sixth Amendment right articulated in *Burch* does not mandate retroactive application.

The jurisprudence of this Honorable Court teaches that the purpose of trial by jury is to prevent government oppression by providing "a safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[23] The jury's essential feature lies in the interposition, between the accused and his accuser, of the common-sense judgement of a group of laymen and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."[24] By its nature, the right to jury trial involves the integrity of

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23 *Duncan v. Louisiana,* 391 U.S. 145, 156 (1968)

24 *Williams v. Florida,* 399 U.S. 78, 100 (1970).

the fact-finding process. However, the extent to which the condemned practice adversely affected that process is a question of degree.[25]

Respondent respectfully presents that the ultimate issue before this Honorable Court is whether the use of nonunanimous six-member juries in the past presents a substantial likelihood that the results of a number of trials were factually incorrect. Respondent maintains it does not.

This Honorable Court first considered the right to jury trial in the state courts in *Duncan v. Louisiana*, 391 U.S. 145 (1968). Duncan struck down a Louisiana statute which provided that a crime punishable by up to two years imprisonment was triable by the judge alone. The Court held that because trial by jury in "serious"[26] criminal cases is "fundamental to the American scheme of justice" and essential to due process, the Fourteenth Amendment guarantees a state criminal defendant the right to a jury trial in any case, which if tried in federal court, would require a jury under the Sixth Amendment. *Id*, at 149, 158-159. Similarly, in *Bloom v. Illinois*, 391 U.S. 194 (1968) the Court held that the right to jury trial extends to trials for serious criminal contempt.

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25 *Johnson v. New Jersey*, 384 U.S. 719, 728-29 (1966).

26 *Baldwin v. New York*, 399 U.S. 66 (1970) held "serious" offenses to be those punishable by more than six months imprisonment.

In *Johnson v. Louisiana*, 406 U.S. 356 (1971) the Court held that the nine-to-three vote of a nonunanimous jury is not, *per se*, violative of due process.[27]

The Court's decision in *Williams v. Florida*, 399 U.S. 78 (1970) held that six-member unanimous juries are not violative of the Sixth Amendment. The purpose of trial by jury, as noted in *Duncan*, is to prevent government oppression. The jury's essential feature lies in the "interposition between the accused and his accuser of the commonsense judgement of a group of laymen and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." 399 U.S, at 100. These purposes can be fulfilled if the jury is of sufficient size to promote group deliberation, free from outside intimidation, and to provide a fair possibility that a cross-section of the community would be represented. *Id.*

In *Apodoca v. Oregon*, 406 U.S. 404 (1972) the court upheld a state law authorizing ten out of twelve verdicts. The Court held that unanimity does not materially contribute to the exercise of the "commonsense judgement" identified in *Williams*. The judgement of the defendant's peers will be interposed between him and the State whether the verdict is unanimous or nonunanimous. 406 U.S., at 412. Additionally, the

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27 The trial at issue occurred before *Duncan v. Louisiana*, 391 U.S. 145 (1968) and therefore the Sixth Amendment itself was not involved. *DeStefano v. Woods*, 392 U.S. 631 (1968).

Court ruled that unanimity is not a necessary precondition for application of the "cross-section" requirement. 406 U.S. at 413.

In *Ballew v. Georgia*, 435 U.S. 223 (1978) the Court, in separate opinions, held that juries composed of five persons violate the Sixth Amendment.[28] Admitting the difficulty of drawing a line between five and six member juries, ". . . . at least five members of the Court believed that reducing a jury to five persons in nonpetty cases raised sufficiently substantial doubts as to the fairness of the proceeding and the proper functioning of the jury . . ." *State v. Burch*, ____ U.S. at ____; 98 S.Ct., at 1038. Essentially, *Ballew* established that when juries are composed of fewer tha six persons their ability to deliberate effectively becomes questionable, and their representative character is doubtful.

Apodaca, *Williams*, and *Ballew*, when read together, indicate that effective group deliberation, as well as community representation are functions of the absolute *size* of a jury, rather than the count of its final verdict.

However, in *Burch v. Louisiana*, ____U.S. ____, 99 S.Ct. 1623 (1979) the Court held that:

28 Petitioner contends in brief that the Court has applied *Ballew*, retroactively, citing *Robinson v. Georgia*, 435 U.S. 991 (1978) which was vacated and remanded for consideration in light of *Ballew*. Respondent submits that this action is not be to equated with a finding of retroactivity. Further, that while *Ballew* and *Burch* are similar, application of the *Stovall* balancing test might well yield differing results.

> . . . . much the same reasons that led us in *Ballew* to decide that use of a five-member jury threatened the fairness of the proceeding and the proper role of jury, lead us to conclude now that conviction for a nonpetty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee . . . ____ U.S. at ____, 99 S.Ct., at 1628.

The Court freely admitted that its decision involved a line-drawing process which was not wholly satisfactory, but noted that lines must be drawn somewhere if the right to jury trial is to be preserved. ____ U.S. at ____; 99 S.Ct., at 1627.

For the following reasons the State submits that the purpose of *Burch* does not mandate retroactivity.

First, it is clear that the involvement of the right to jury trial is not a talisman that automatically implies retroactivity. *See e.g., Daniel v. Louisiana*, 419 U.S. 31 (1975) (holding *Taylor v. Louisiana*, 419 U.S. 522 (1975) to have prospective application). That is, the choice between retroactivity and nonretroactivity in no way turns on the "value" of the constitutional guarantee involved. *E.g., Johnson v. New Jersey*, 348 U.S. 719, 728 (1966).

Second, Respondent suggests that while *Burch* teaches that the vote of a unanimous six-member jury

is constitutionally preferrable to that of a nonunanimous jury, it does not stand for the proposition that nonunanimous verdicts have been *per se* wrongly-decided or unfair in the past. Although the Constitution requires demarcation lines to be drawn at some point, the same cross-section of the community interposes itself between accused and accuser whether all members or only five concur in the final judgment. Although a unanimous verdict may imply that a more perfect deliberation process has occurred, the fact that rational men disagree is not in itself equivalent to a failure of proof.

Third, the State submits that the nonunanimous six-member jury was not an institution that *substantially* impaired the truth finding process to such an extent that serious doubts are raised about the accuracy of past verdicts. *See Hankerson v. North Carolina*, 432 U.S., at 243. If it had been, the question presented in *Burch* would not have been as close as the Court characterized it: "We agree with the Louisiana Supreme Court that the question presented is a 'close' one." *Burch v. Louisiana*, ____ U.S., at ____, 99 S.Ct., at 1625. *Compare, Burch v. Louisiana with e.g., Hankerson v. North Carolina*, 432 U.S. 223 (1977) (burden of State to prove guilt beyond a reasonable doubt); *Arsenault v. Massachusetts*, 393 U.S. 6 (1968) (right to counsel at preliminary hearing where guilty plea entered); *Jackson v. Denno*, 378 U.S. 368 (1964) (right to preliminary determination of voluntariness of confession outside presence of the jury); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel in felony trial).

Fourth, Respondent maintains that the purpose of *Burch* was to enhance the reliability of the jury verdict. However, this Honorable Court has refused retroactive application to numerous constitutional rules that are likewise directed at the reliability of the fact-finding process. *See e.g., Gosa v. Mayden*, 413 U.S. 665 (1973) (denying retroactive application to *O'Callahan v. Parker*, 395 U.S. 258 (1969)). *Adams v. Illinois*, 405 U.S. 278 (1972) (*Coleman v. Alabama*, 399 U.S. 1 (1970) not retroactive); *Stovall v. Denno*, 388 U.S. 293 (1967) (*United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967) not retroactive). *Johnson v. New Jersey*, 384 U.S. 719 (1966) (*Escobedo v. Illinois*, 378 U.S. 478 (1964) and *Miranda v. Arizona*, 384 U.S. 436 (1966) not retroactive); *Tehan v. United States ex rel Shott*, 382 U.S. 406 (1966) (*Griffin v. California*, 380 U.S. 609 (1965) not retroactive).

As demonstrated by the above mentioned authorities, "retroactivity is not required by a determination that the old standard was not the most effective vehicle for ascertaining truth, or that the truth determining process was aided somewhat by the new standard." *Gosa v. Mayden*, 415 U.S., at 680.

Finally, Respondent submits that the decisions of the Court in *DeStefano v. Woods*, 392 U.S. 631 (1968) and *Gosa v. Mayden*, 413 U.S. 655 (1973) control the issue before the bar. In *DeStefano*, the Court, *per curiam*, applied the three-pronged test and denied retroactive application to *Duncan v. Louisiana*,[29] and *Bloom v. Illinois*.[30] These cases

29 391 U.S. 145 (1968).

30 391 U.S. 194 (1968).

involved serious criminal convictions where *no* jury, unanimous or nonunanimous, had interposed its commonsense deliberations between accused and accuser. Nevertheless, the Court stated: "The values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." 392 U.S., at 634.

O'Callahan, was applied prospectively despite the fact that Petitioner, having been denied trial by jury, was convicted by tribunal which the Court criticized as lacking procedural safeguards and being susceptible to improper "command influence", 413 U.S., at 680.

The State submits that since the complete lack of a jury is not a sufficient impairment of the fact-finding process as to require retroactivity, then the presence of one dissenting juror should likewise not trigger retroactive application.

In summary, the purpose of *Burch v. Louisiana* does not automatically mandate retroactive application. Therefore, examination of the second and third components of the *Stovall* test; "reliance" and "impact" are appropriate.

III. Reliance on the Pre-existing Standard

The second prong of the *Stovall* test addresses the reliance of law enforcement authorities and state

courts on the pre-existing law. The essential inquiry is whether the State should have forseen the new constitutional ruling, and changed the existing practices in anticipation of an inevitable Supreme Court pronouncement.[31]

Respondent maintains that at the time of Petitoner's conviction the State of Louisiana was conducting trials in good-faith reliance on existing law, and that the State cannot be charged with having anticipated *Burch v. Louisiana*.

At the time of Petitioner's trial, Article I, Section 17 of the Louisiana Constitution of 1974 provided that a crime punishable by more than six months imprisonment in the Parish jail was triable by a six member jury, five of whom must concur to render a verdict. Articles 779(A) of the Louisiana Code of Criminal Procedure implemented that constitutional provision.[32] These rules were enacted after, and in apparent reliance on, this Honorable Court's decisions in *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Baldwin v. New York*, 399 U.S. 66 (1970); *Williams v. Florida*, 399 U.S. 78 (1970); *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson v. Louisiana*, 406 U.S. 356 (1972).

The decisions of this Honorable Court had put the State on notice that:

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31 *See e.g., Johnson v. New Jersey*, 384 U.S. 719, 730 (1966).

32 *See* note 1, *supra*, for text of these provisions.

I. The Constitution requires that defendants charged with offenses punishable by more than six months imprisonment are entitled to a jury trial.[33]

II. Six-member juries are large enough to accomplish the purpose of the Sixth Amendment: prevent government oppression, deliberate effectively, and represent a cross-section of the community.[34]

III. Five-member juries are violative of the Sixth Amendment, because a demarcation line must be drawn at some point; statistical studies indicate that as jury size diminishes, commonsense deliberation become less likely, and the jury becomes less representative of the community.[35]

IV. Nonunanimous twelve-member juries (83.3% vote) can prevent oppression, exercise group commonsense and represent a fair cross section, just as unanimous juries.[36]

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33 *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Baldwin v. New York*, 399 U.S. 66 (1970).

34 *Williams v. Florida*, 399 U.S. 78 (1970).

35 *Ballew v. Georgia*, 435 U.S. 223 (1978). *Ballew* was decided after the statutory framework, at Note 1, *supra*, was enacted.

36 *Apodaca v. Oregon*, 406 U.S. 404 (1972).

V. The nine-to-three vote (75%) of a nonunanimous jury is not violative of due process.[37]

The State submits that the jurisprudence existant at the time of Petitioner's conviction cannot reasonably be interpreted as "foreshadowing" the *Burch* decision.

For example, in *Roberts v. Russel*,[38] the Court applied the three-factor Stovall test to *Bruton v. United States*,[39] and determined that long and widespread attack on the old rule by the lower courts "foreshadowed" *Bruton*. 392 U.S., at 294. In *Berger v. California*,[40] the Court gave retroactive effect to the confrontation-clause rule of *Barber v. Page*,[41] noting that *Barber* had been "clearly foreshadowed if not preordained" by *Pointer v. Texas*.[42] 393 U.S., at 315.

In contrast, the converted issue in Burch had not engendered attacks in the lower courts, nor can this Court's decisions be said to have "clearly foreshadowed" the ruling.

Indeed, as the majority opinion in *Burch* states: "We agree with the Louisiana Supreme Court that the ques-

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37 *Johnson v. Louisiana*, 406 U.S. 356 (1972).

38 392 U.S. 293 (1968).

39 391 U.S. 123 (1968).

40 393 U.S. 314 (1979).

41 390 U.S. 719 (1968).

42 380 U.S. 400 (1965).

tion presented is a 'close' one." ____ U.S., at ____, 99 S.Ct., at 1625. Further, the Court explained:

> As in *Ballew*, we do not pretend the ability to discern *a priori* a bright line below which the number of jurors participating in the trial or in the verdict would not permit the jury to function in the manner required by our prior cases." ____ U.S., at ____, 99 S.Ct. at 1627.

IV. Effect on the Administration of Justice

The State submits that a retroactive application of *Burch* would have a devastating effect on the administration of criminal justice in Louisiana.[43]

First, Respondent takes issue with Petitioner's contention that: ". . . . most cases tried before six-person juries in Louisiana usually do not merit long prison terms. Thus, most defendants who were improperly convicted have probably served their terms and left prison." (Brief of Petitioner, page 17) Numerous

43 No statistics are available concerning the number of persons currently in custody following convictions by nonunanimous six-member juries. Internal records of the Office of the District Attorney for Orleans Parish indicate that thirty-nine defendants were convicted in New Orleans by six-member juries during the period between January 1, 1979 and April 17, 1979, the date of *Burch*. Whether these convictions were unanimous or nonunanimous cannot be ascertained. *See* text at note 48, *infra*.

serious felonies have historically been triable by six-member juries in Louisiana.[44] Penalties range up to

44 *See, e.g.*, La. R.S. 14:28, inciting a felony, (West 1974); La. R.S. 14:32, negligent homicide, (West 1974); La. R.S. 14:34, aggravated battery, (West Supp. 1979); La. R.S. 14:34.1, second degree battery, (West Supp. 1979); La. R.S. 14:38.1, mingling harmful substances, (West Supp. 1979); La. R.S. 14:43, simple rape, (West Supp. 1979); La. R.S. 14:45, simple kidnapping, (West 1974); La. R.S. 14:53, arson with intent to defraud, (West 1974); La. R.S. 14:55, aggravated criminal damage to property, (West 1974); La. R.S. 14:56, simple criminal damage to property, (West 1974); La. R.S. 14:57, damage to property with intent to defraud, (West 1974); La. R.S. 14:58, contaminating water supplies, (West 1974); La. R.S. 14:62, simple burglary, (West Supp. 1979); La. R.S. 14:65, simple robbery, (West 1974); La. R.S. 14:67, theft, (West 1974); La. R.S. 14:69, receiving stolen things, (West 1974); La. R.S. 14:71, issuing worthless checks, (West Supp. 1979); La. R.S. 14:72, forgery, (West 1974); La. R.S. 14:76, bigamy, (West 1974); La. R.S. 14:77, abetting bigamy, (West 1974); La. R.S. 14:78, incest, (West 1974); La. R.S. 14:80, carnal knowledge of a juvenile, (West Supp. 1979); La. R.S. 14:81, indecent behavior with juveniles, (West Supp. 1979); La. R.S. 14:82, prostitution, (West Supp. 1979); La. R.S. 14:84, pandering, (West Supp. 1979); La. R.S. 14:86, enticing minors into prostitution, (West Supp. 1979); La. R.S. 14:87.4, abortion advertising, (West 1974); La. R.S. 14:89, crime against nature, (West Supp. 1979); La. R.S. 14:92, contributing to the delinquency of juveniles, (West Supp. 1979); La. R.S. 14:93, cruelty to juveniles, (West Supp. 1979); La. R.S. 14:94, illegal use of weapons or dangerous instrumentalities, (West 1974); La. R.S. 14:95, illegal carrying of weapon, (West Supp. 1979); La. R.S. 14:96, aggravated obstruction of a highway of commerce, (West Supp. 1979); La. R.S. 14:98, operating a vehicle while intoxicated, (West Supp. 1979); La. R.S. 14:106, obscenity, (West Supp. 1974); La. R.S. 14:110, simple escape; aggravated escape, (West Supp. 1979); La. R.S. 14:111, assisting escape, (West 1974); La. R.S. 14:118, public bribery , (West 1974); La. R.S. 14:118.1, bribery of sports participants, (West 1974); La. R.S. 14:119, bribery of voters, (West 1974); La. R.S. 14:119.1, bribery of parents of school children, (West 1974); La. R.S. 14:120, corrupt influencing, (West 1974); La. R.S. 14:122, public intimidation, (West Supp. 1979); La. R.S. 14:125, false swearing, (West 1974); La. R.S. 14:126.1, false

swearing for purpose of violating public health or safety, (West 1974); La. R.S. 14:126.2, false statements concerning denial of constitutional rights, (West 1974); La. R.S. 14:131, compounding a felony, (West 1974); La. R.S. 14:132, injuring public records, (West 1974); La. R.S. 14:133.1, obstruction of court orders, (West Supp. 1979); La. R.S. 14:138, public payroll fraud, (West 1974); La. R.S. 14:140, public contract fraud, (West Supp. 1979); La. R.S. 14:141, prohibited splitting of profits, fees, or commissions, (West 1974); La. R.S. 14:201, collateral securities, unauthorized use or withdrawal prohibited, (West 1974); La. R.S. 14:202, contractors, misapplication of payments prohibited, (West 1974); La. R.S. 14:207, motor vehicles, alteration or removal of identifying numbers prohibited; sale, etc. of motor vehicle with altered identifying numbers prohibited, (West 1974); La. R.S. 14:209, seals, breaking prohibited, (West 1974); La. R.S. 14:210, taxicabs, tampering with meter forbidden, (West 1974); La. R.S. 14:211, timber, wilful purchase when not paid for by seller prohibited, (West 1974); La. R.S. 14:212, timber, false statement by seller prohibited, (West 1974); La. R.S. 14:219, removal of building or structure from immovable property subject to a conventional mortgage or vendor's privilege, (West 1974); La. R.S. 14:220, rented or leased motor vehicles; obtaining by false representation, etc.; failure to return, (West 1974); La. R.S. 14:221, avoiding payment for telecommunication services, (West 1974); La. R.S. 14:222, possession, manufacture, sale or transfer of devices for avoidance of payment for telecommunications service or related offenses; seizure of devices, (West 1974); La. R.S. 14:227, identification number, personal property, alteration or removal prohibited, (West Supp. 1979); La. R.S. 14:285, telephone communications, improper language, harassment, (West 1974); La. R.S. 14:351, bail, sale, etc. of real estate securing, prohibited, (West 1974); La. R.S. 14:352, bribery of withdrawn candidates for office prohibited, (West 1974); La. R.S. 14:356, sheriffs, etc., solicitation of legal business prohibited, (West 1974); La. 14:401, demonstrations in or near building housing a court or occupied as residence by judge, juror, witness or court officer, (West 1974); La. 14:402, taking contraband to or from correctional institutions, (West Supp. 1979); La. 14:402.1, taking of contraband to state owned hospitals, (West 1974); La. R.S. 14:511, loansharking, (West Supp. 1979); La. R.S. 14:512, aggravated loansharking, (West Supp. 1979); La. R.S. 14:513, possession of loanshark records, (West Supp. 1979).

terms of twelve years at hard labor.[45] In the case of habitual felons, a conviction by a six-member jury can ultimately result in a sentence of life imprisonment.[46] Indeed, Petitioner's own sentence was twenty-two years at hard labor.[47] The logical conclusion of Petitioner's argument is, therefore, that those inmates serving the longest sentences, habitual felons, are the persons most likely to benefit from retroactive application.

Second, in many individual cases, it is impossible to determine whether or not a jury verdict was unanimous. Jury polls are not mandated by law, but must be requested by counsel.[48] When counsel did request a

45 *See e.g.*, La. R.S. 14:62, simple burglary, (West Supp. 1979).

46 La. R.S. 15:529.1

47 Appendix, page 3

48 Article 812, La. Code Crim. Pro. (West Supp. 1980) provides:

The Court shall order the clerk to poll the jury if requested by the state or the defendant. It shall be within the discretion of the court whether such poll shall be conducted orally or in writing by applying the procedures of Paragraph (1) or Paragraph (2) of this Article.

(1) Oral polling of the jury shall consist of the clerk's calling each juror, one at a time, by name. He shall announce to each juror the verdict returned, and ask him, "Is this your verdict?" Upon receiving the juror's answer to the question, the clerk shall record the answer.

If, upon polling all of the jurors, the number of jurors required by law to find a verdict answer "Yes", the court shall order the clerk to record the verdict and the jury shall be discharged. If, upon polling all of the jurors, the number required to find a verdict do not answer "Yes", the jury may be remanded for further deliberation, or the court may declare a mistrial in accordance with Article 775.

(2) The procedure for the written polling of the jury shall require that the clerk hand to each juror a separate

poll, the result was not necessarily made part of the record.[49] The reconstruction of the voting count from a silent record would be an onerous if not impossible task.[50]

Third, Respondent submits that retroactive application would involve not only expense and effort, but the wholesale release of prisoners found guilty by truthworthy evidence in conformity with previously established standards. In *Gosa v. Mayden*, 413 U.S. 665, 685 (1973) the Court observed:

> We must necessarily also consider the impact of a retroactivity holding on the interests of society when the new constitutional standard promulgated does not bring into question the accuracy of guilt. Wholesale invalidation

piece of paper containing the name of the juror and the words "Is this your verdict?" Each juror shall write on the slip of paper the words "Yes" or "No" along with his signature. The clerk shall collect the slips of paper and make them available for inspection by the court and counsel, and record the results. If a sufficient number of jurors as required by law to reach a verdict answer "yes" the clerk shall so inform the court. Upon verification of the results, the court shall order the clerk to record the verdict and order the jury discharged. If an insufficient number required to find a verdict answer "Yes", the court may remand the jury for further deliberation, or the court may declare a mistrial in accordance with Article 775.

49 It has been the practice of some courts in Orleans Parish to conduct a written poll, examine the ballots, then merely note for the record that the verdict is lawful, without disclosing the count. The written ballots do not necessarily become part of the record.

50 C.F.: *Adams v. Illinois*, 405 U.S. 278 (1972) where the Court held that *Coleman v. Alabama*, 399 U.S. 1 (1970) was to be given prospective effect. In discussing the effect retroactivity might

> of convictions rendered years ago could well mean that convicted persons would be freed without retrial, for witnesses, . . . no longer may be readily available, memories may have faded, records may be incomplete or missing, and physical evidence may have disappeared. Society must not be made to tolerate a result of that kind when there is no significant question concerning the accuracy of the process by which judgment was rendered or, in other words, when essential justice is not involved.

For the above-mentioned reasons, Respondent submits that retroactive application of *Burch* would seriously disrupt the administration of the criminal laws of the State of Louisiana.

Rebuttal

In brief, Petitioner argues that if the Court denies retroactive effect to *Burch*, then it should exhume the distinction[51] between cases pending on direct review

have on the administration of justice, the Court noted:

> "The task of conducting such hearings would be immeasurably complicated by the need to construct a record of what occurred. In Illinois, for example, no court reporter was present at pre-*Coleman* preliminary hearings and the proceedings are therefore not recorded".

51 The Court's decisions in *Linkletter v. Walker*, 381 U.S. 618 (1965) and *Tehan v. United States ex rel Shott*, 382 U.S. 406 (1966) applied only to cases on collateral review; cases pending on direct review received the benefit of the newly articulated rule. However, this result was a foregone conclusion. Both *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Griffin v. California*, 380 U.S. 609 (1965) had been specifically applied to cases on direct review without discussion, before *Linkletter* was decided.

and those on collateral review. (Brief of Petitioner, page 17, 18) Essentially, he argues that it is unfair that *Burch*, a "chance beneficiary,"[52] should benefit from the Court's decision, while Petitioner similarly situated, does not.[53]

Respondent submits that it is well-settled that cases on direct review and collateral review are to be treated similarly for the purpose of the issue before the bar. *Johnson v. New Jersey*, 384 U.S. 719, 732 (1966); *Stovall v. Denno*, 388 U.S. 293, 300 (1967). The countervailing factors of "good-faith reliance" and the "impact on the administration of justice" which mandate prospectively as discussed above, admit no distinction. Further, Respondent submits that distinguishing cases on the basis suggested by Petitioner is not in any measure more equitable than the settled rule. Petitioner proposes no reason why those who have exhausted direct appellate avenues are less deserving of newly recognized constitutional rules than those who have not.

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52 *Stovall v. Denno*, 388 U.S. 293, 301 (1966).

53 Petitioner's contention has received consistent, although minority support throughout the jurisprudence of retroactivity. *See e.g., Hankerson v. North Carolina*, 432 U.S. 233, 246 (1977) (Powell J., concurring in the judgment); *Mackey v. United States*, 401 U.S. 667, 675-702 (Harlan, J., separate opinion); *Williams v. United States*, 401 U.S. 646, 665 (1971) (Marshall, J., concurring in part and dissenting in part).

CONCLUSION

Respondent urges that the purpose of *Burch v. Louisiana*, ____ U.S. ____, 99 S.Ct. 1623 (1979) was to enhance the reliability of six-member jury verdicts. Retroactivity is inappropriate because the accuracy of prior verdicts is not in serious doubt. A prospective application of *Burch* is justified by the good-faith reliance of the criminal justice system on the pre-existing rules, and by the serious impact a retroactive ruling would have on the administration of the criminal laws of the State of Louisiana.

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